IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

Criminal Revision No.320 of 2004

Date of Decision: December 06, 2006

Punjab State Civil Supplies Corporation Limited, Faridkot

...Petitioner

VERSUS

Pargat Singh

...Respondent

CORAM: HON'BLE MR.JUSTICE RANJIT SINGH

1. Whether Reporters of local papers may be allowed to see the judgment?yes
2. To be referred to the Reporters or not? yes
3. Whether the judgment should be reported in the Digest? yes

Present: Ms.Deepali Puri, Advocate,
for the petitioner.

Mr.D.K.Kaushal, Advocate,
for the respondent.

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This revision is directed against the order dated 22.11.2003 passed by Judicial Magistrate Ist Class, Faridkot dismissing the complaint filed by the complainant for want of prosecution and resultantly ordering discharge of the respondent. District Manager, Punjab State Civil Supplies Corporation Ltd., Faridkot filed a complaint against Pargat Singh respondent under Section 138/140 of the Negotiable Instruments Act. The case was fixed on 22.11.2003. The impugned order would show that it was called in the morning and was

adjourned to 12.30 P.M. as none appeared on behalf of the parties. The situation did not change when the case was taken up at 12.30 P.M. and it was adjourned to be taken up after lunch. When no one appeared even after lunch, the Judicial Magistrate Ist Class dismissed the complaint for want of prosecution and discharged the accused-respondent. The petitioner has impugned this order on the ground that his counsel had wrongly noted the date and as such he could not appear on the date fixed. Accordingly, this revision petition has been filed for setting-aside the impugned order.

Notice of motion in this case was issued on 6.4.2004 and Shri D.K.Kaushal has put in appearance on behalf of the respondent. Learned counsel for the respondent contends that the present revision is not maintainable as the order dismissing the complaint in default and resultant discharge of the respondent would amount to his acquittal against which appeal only is maintainable. In support of his submissions, the counsel has placed strong reliance on Him Advances and Savings Pvt.Ltd. v. Ravinder Kumar Gupta, (HP) 2003 (1) R.C.R.(Criminal) 372, M.M.S.Bedi v. Union Territory of Chandigarh, (P&H) 1987(2) R.C.R.(Criminal) 60 and Hem Chander Sharma v. State of Haryana, 1987(2) R.C.R.(Criminal) 663. In Him Advances's case (supra), the accused was acquitted by the Court under Section 256 of the Code when complainant did not appear. Referring to Section 378(1)(a) of the Code, the High Court held that such an order was appealable and hence revision was not maintainable. In this case, the High Court also held that even the inherent jurisdiction of the court could not be invoked. M.M.S.Bedi's case (supra) appears to be on different footing. In this case, it was

held that when an accused is discharged due to non-appearance of complainant, it would be deemed acquittal and hence second complaint for same allegations would be barred in view of Section 300 of the Code. Hem Chander Sharma's case (supra) was not a case where the complaint was dismissed in default, but it was a case where complaint was dismissed and accused acquitted. It was held that revision against such an order is not maintainable and appeal would lie against such order. Though the counsel had taken time to show that in such circumstances, the revision could not be treated as an appeal, yet he has not placed any judgment of this Court before me.

On the other hand, the counsel for the petitioner has urged that such technicalities can not stand in the way of the Court, when the aim is to prevent mis-carriage of justice. As per the counsel, the Court would have ample powers under Section 482 Cr.P.C. or other enabling provisions to take correctional measures. The counsel would say that if the order is allowed to remain, it will cause mis-carriage of justice. In support of her submission, the counsel has drawn my attention to the case of Punjab State Civil Supplies Corporation Ltd. v. Mangat Rai, 2002(4) R.C.R.(Criminal) 458, where such a course was adopted. In Duni Chand, Member Panchayat and others v. Savitri Devi, 1984(1) RCR (Criminal) 115, it was held that where revision was filed before the Sessions Court against conviction, it could treat the revision as an appeal and exercise powers vested in it accordingly. Murari Lal v. Madan Lal and others, 1996(2) Recent Criminal Reports 657 is another case where it was observed that when the complaint is dismissed in

default, the petition to challenge the same under Section 482 Cr.P.C is maintainable. In the case of Shiv Kumar v. Mohd.Saghir, 1997(1) Recent C.R.709, the complaint filed under Section 138 was dismissed in default for non-appearance of the complainant. It was observed that the complaint should not have been dismissed in default for non-appearance of the complainant or counsel when they had been appearing for four years and merely because the complainant could not put in appearance on one hearing. It was observed that the Magistrate had not exercised his discretion vested in him under Section 256 of the Criminal Procedure Code judiciously.

In this case, the Magistrate has apparently not acted under Section 256 of the Code of Criminal Procedure. Operative portion of the order reads as under:-

> "Present:-None
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> Case called again in the after lunch session, but neither complainant nor his counsel has come forward. No application for exemption from personal appearance of the complainant has been moved. It is already 2.50 P.M., therefore, the complaint is ordered to be dismissed for want of prosecution. Accused stands discharged. File be consigned to the record room."

Under similar circumstances, this Court in Murari Lal's case (supra) held that where the Magistrate concerned has not proceeded under Section 256(1) of the Cr.P.C. and acquitted the accused and has dismissed the complaint in default, then petition under Section 482 Cr.P.C. would be maintainable.

M.M.S.Bedi's case (supra) relied upon may not also help the respondent because in that case, the order discharging the accused, was made under the provisions of Section 256 of the Code. Under these circumstances, it was observed that it ought to have been an order of acquittal. As noticed above, even Him Advances's case (supra) was a case where order under Section 256 of the Code was passed acquitting the accused. Under the circumstances, it can be said that Section 482 Cr.P.C. would be available in such cases and would leave ample powers with the Court to pass an order, which is essential to prevent the abuse of the process of the court or otherwise to secure the ends of justice. It is clearly held in Mangat Rai's case (supra) that maintainability of a revision petition in such circumstances can not stand in the way of this court to exercise powers vested under Section 482 of the Code to take a correctional measures. In fact exercise of jurisdiction in such a case would be essential to secure the ends of justice and to avoid the mis-carriage of justice. In Murari Lal's case (supra), petition under Section 482 of the Code was entertained against such an order. Since no order of acquittal has been passed in this case under Section 256 of the Code, it is debatable if appeal against such an order would still lie. No doubt, when an order, dismissing the complaint is made under Section 256 of the Code, it amounts to an acquittal and hence appealable one. While dismissing the complaint for want of prosecution, the accused was ordered to be discharged. It is open for the respondent to say that this may amount to his acquittal in view of Section 256 of the Code. It may need a mention that appellate jurisdiction is much wider in scope and sweep as

compared to revision. Hon'ble Supreme Court in State of Kerala v. K.M.Charia Abdullah & Co. AIR 1965 SC 1585 highlighted this difference as follows:-

> “There is an essential distinction between an appeal and a revision. The distinction is based on the differences implicit in the said two expressions. An appeal is a continuation of the proceedings; in effect the entire proceedings are before the appellate authority and it has power to review the evidence subject to the statutory limitations prescribed. But in the case of a revision, whatever powers the revisional authority may or may not have, it has not the power to review the evidence unless the statute expressly confers on it that power.”

Hon'ble Supreme Court in The Associated Cement Co.Ltd. v. Keshvanand, 1998(1) RCR (Criminal) 309 dealt with the scope of Section 256 of the Code by observing:-

> “14. Section 256 of the Code of Criminal Procedure, 1973 (for short `the new Code') is the corresponding provision to Section 247 of the old Code. The main body of both provisions is identically worded, but there is a slight difference between the provisos under the two sections. The proviso to Section 256 of the new Code is reproduced here:
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> “Provided that where the complainant is represented by a pleader or by the officer conducting the prosecution or where the Magistrate is of opinion that the personal attendance of the complainant is not necessary, the

Magistrate may dispense with his attendance and proceed with the case."

15.What was the purpose of including a provision like Section 247 in the old Code (or Section 256 in the new Code. It affords some deterrence against dilatory tactics on the part of a complainant who set the law in motion through his complaint. An accused who is per force to attend the court on all posting days can be put to much harassment by a complainant if he does not turn up to the court on occasions when his presence is necessary. The section, therefore, affords a protection to an accused against such tactics of the complainant. But that does not mean if the complainant is absent, court has a duty to acquit the accused in invitum."

Accordingly, even under Section 256, it is not always that the Courts are obliged to dismiss the complaints due to absence of the complainant. Proviso under Section 256 Cr.P.C. would clearly give an indication as to how powers are to be exercised for dismissing the complaint on account of non-appearance of the complainant. Even words used in Section 256(1) Cr.P.C. reading "unless for some reasons, he thinks it proper to adjourn the hearing of the case to some other day" would appear to leave enough discretion with the Magistrate to adjourn the case instead of acquitting the accused. This is a judicial discretion, to be exercised by the court judiciously. As per this proviso, where the complaint is presented by a pleader and Magistrate is of the opinion that the personal attendance of the

complainant is not necessary, then the Magistrate may dispense with his attendance and proceed with the case. The proviso has already been reproduced above.

It has not been noted in the impugned order if the Magistrate had satisfied himself about the requirement of personal attendance of the complainant on the date this order was passed. Accordingly, it can be said that the impugned order was not passed in judicious exercise of discretionary powers available under the said section. In this regard, observations of the Hon'ble Supreme Court in the case The Associated Cement Co.Ltd.'s case (supra), may be noticed, which are as under:-

> “16. Reading the section in its entirety would reveal that two constrains are imposed on the court for exercising the power under the Section. First is, if the court thinks that in a situation it is proper to adjourn the hearing then the Magistrate shall not acquit the accused. Second is, when the Magistrate considers that personal attendance of the complainant is not necessary on that day the Magistrate has the power to dispense with his attendance and proceed with the case. When the court notices that the complainant is absent on a particular day the court must consider whether personal attendance of the complainant is essential on that day for the progress of the case and also whether the situation does not justify the case being adjourned the court is free to dismiss the complaint, acquit the accused. But if the presence of the complainant on that day was quite unnecessary then

resorting to the step of axing down the complaint may not be a proper exercise of the power envisaged in the section. The discretion must, therefore, be exercised judicially and fairly without impairing the cause of administration of criminal justice."

Even when the case is considered in the light of law, as afore-mentioned, there cannot be much doubt that the Magistrate should not have resorted to the axing process, when the case was not fixed for any such proceedings where the personal presence of the complainant could be considered essential on that day for progress of the case. The case set up by the complainant is that the counsel had noticed the wrong date which is well indicative from the fact that none was even present on behalf of the accused on all the occasions when the case was called/taken up for hearing on 22.11.2003. It could have been due to wrong noting of date by counsel. Since the accused was also not present when the case was called, it can be said that personal attendance of the complainant could not be considered essential for further progress of the case on that day.

Treating this petition to be under Section 482 Cr.P.C., so as to avoid mis-carriage of justice in this case, the impugned order is hereby set-aside and the case is remanded back to the Magistrate concerned. The prosecution would now proceed from the stage where it reached before the order dismissing the complaint for non-prosecution was passed.

December 06, 2006 (RANJIT SINGH)
ramesh JUDGE